

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID HARRIS BETTY,

Defendant-Appellant.

UNPUBLISHED

December 22, 2009

No. 287381

Oakland Circuit Court

LC No. 2008-219166-FH

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant David Betty appeals as of right from his jury trial conviction of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Pontiac police officer Cedric Bell responded to a felonious assault complaint involving defendant. Bell knew defendant from a previous contact and ran his name through the Law Enforcement Information Network (LEIN). The LEIN check indicated that defendant had two outstanding warrants for his arrest. Bell went to defendant's residence, and with another officer entered the home and arrested defendant. While in the home, the officers seized a coat they found near defendant. According to Officer Bell, the coat was described in the felonious assault complaint. At the police station, Officer Bell found in the coat a small plastic bag containing a substance, which subsequent testing proved was cocaine.

On appeal, defendant first contends that his waiver of trial counsel was constitutionally defective. Appellate courts review a trial court's factual findings surrounding waiver of counsel for clear error. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). However, review is de novo "to the extent that a ruling involves an interpretation of law or the application of a constitutional standard to uncontested facts" *Id.*

The United States and Michigan Constitutions guarantee the right to counsel at critical stages of the proceedings. US Const, Am VI; Const 1963, art 1, § 20; *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). The *Russell* Court stated:

The right to counsel is considered fundamental because it is essential to a fair trial and attaches at the trial stage, which is clearly a critical stage of the proceedings. While a defendant may choose to forgo the assistance of counsel at

trial, any waiver of the right to counsel must be knowing, voluntary, and intelligent. In addition, it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right, including the waiver of the right to the assistance of counsel. [*Russell*, 471 Mich at 187-188 (citations omitted; emphasis in original).]

Further, the defendant must be made aware of the dangers and disadvantages of self-representation. *Id.* at 189. The trial court must also satisfy the requirements of MCR 6.005(D), which provides:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

In *People v Adkins (After Remand)*, 452 Mich 702, 726, 551 NW2d 108 (1996), overruled in part on other grounds by *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004), our Supreme Court clarified that only substantial compliance with these requirements is necessary for an effective waiver. Substantial compliance requires that the court discuss the constitutional requirements of an effective waiver and the substance of MCR 6.005(D) “in a short colloquy with the defendant, and make an express finding that defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.” *Id.* at 726-727.

The difficulty in this case is that we do not know exactly what the court said to defendant with regard to his assertion of the right to self-representation. Due to an unexplained problem, the first 12 to 15 minutes of the trial were videotaped without audio. During that timeframe, the court can be seen having a conversation with defendant. In an affidavit submitted with the prosecutor’s motion to correct the record, defendant’s stand-by trial counsel, Michael McCarthy, attested to the fact that the judge advised defendant of the pros and cons of representing himself and that defendant chose to represent himself with his assistance. Notably, at a pretrial hearing, defendant was adamant that he would not go to trial with McCarthy as his attorney.¹

During the recorded portion of the trial, defendant clearly stated, “I’d rather represent myself in this matter.” At the hearing on the motion to correct the record, the trial court added that it was certain defendant was advised of the charge. The court also indicated that it believed

¹ We note that, according to McCarthy’s affidavit and the transcript, while defendant presented an opening statement and asked a question of one witness, McCarthy conducted the voir dire, examined all of the witnesses, and presented a closing argument, although the court gave defendant the opportunity to be involved in conducting the trial himself as much as he chose.

defendant was advised of the maximum possible prison sentence because the court would have given the advisory out of habit. Notably, defendant had also received general information advising him of the maximum possible sentence. From these facts, we conclude that the court substantially complied with the requirements for waiver. The court had a colloquy with defendant about the requirements of an effective waiver and defendant asserted his clear preference to waive counsel. This was sufficient under *Adkins*, 452 Mich at 726-727. On this record, there was a valid, unequivocal waiver of counsel.

Defendant next asserts that the police had no basis to enter his residence and that the jacket was improperly seized. Although the former issue was raised prior to trial, the latter was not and is, in fact, unpreserved. A trial court's factual findings on a suppression issue are reviewed for clear error, while questions of law and the decision on the motion are reviewed de novo. *People v Jones*, 249 Mich App 131, 135; 640 NW2d 898 (2002). As to the unpreserved claim of error, defendant must show that the error was plain, that it affected his substantial rights, and that he is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

"[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v New York*, 445 US 573, 603; 100 S Ct 1371; 63 L Ed 2d 639 (1980);² *People v Clement*, 107 Mich App 283, 288; 309 NW2d 236 (1981). Here, Bell's LEIN check revealed two warrants for defendant's arrest, including one felony arrest warrant. Although defendant contests the validity of the felony warrant, the police had no reason to doubt its validity. The exclusionary rule is not applicable where the police act in good faith and in objectively reasonable reliance on a warrant that is subsequently invalidated. *Herring v United States*, __ US __; 129 S Ct 695, 701-703; 172 L Ed 2d 496 (2009) (exclusionary rule did not require suppression of evidence found incident to arrest where police reasonably believed that an outstanding arrest warrant existed). In this case, and assuming a problem with respect to the validity of the warrant, defendant has failed to establish how the police reliance on the LEIN check was anything other than reasonable.

Further, the police had reason to believe defendant was inside the home. Principally, he had been seen there by the police the night before. Additionally, before entering the residence, Bell spoke with Jamal Johnson, a relative of defendant who told him that defendant was inside. Given these facts, the trial court did not err in rejecting defendant's motion to suppress on the basis of the purportedly illegal entry into the home.

Defendant also claims that the police illegally seized the jacket found in the basement. "The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549

² The *Payton* Court's ruling spoke in terms of a felony arrest warrant. *Payton*, 445 US at 602-603.

NW2d 849 (1996). Here, Bell testified that they seized the coat because it was described in the felonious assault complaint. This testimony indicates that the incriminating character of the coat was immediately apparent. Given this evidence, defendant has not shown that the jacket was improperly seized, and thus there was no plain error in admitting into evidence the cocaine later found in the jacket.

Finally, defendant argues that jail credit earned from the time of his arrest until sentencing should have been applied to his new sentence, rather than to the sentence for which he was on parole at the time of his arrest. Specifically, defendant contends that this Court's interpretation of MCL 769.11b is contrary to its plain language, that application of that interpretation is unconstitutional, and that even if that interpretation is correct, the trial court had common law discretion to grant credit aside from the statute. However, after defendant's claim of appeal was filed, our Supreme Court released its opinion in *People v Idziak*, 484 Mich 549; 73 NW2d 616 (2009). In that opinion, the Court analyzed and rejected all of the sentencing credit arguments raised by defendant in this case. *Id.* at 552. We are bound to follow that opinion, and accordingly conclude that defendant's claims of error concerning jail credit are without merit.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra